ORRICK LEGALNINJA SERIES

3

EMPLOYMENT LAW FOR TECH COMPANIES

Revised 2023 Edition

orrick

VC & TECH BRIEFINGS GERMANY

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About the Orrick Legal Ninja Series

About the Orrick Legal Ninja Series – OLNS

In substantially all of the major world markets, we have dedicated technology lawyers who support young German tech companies on their growth trajectory through all stages. As one of the top tech law firms in the world, we are particularly committed to bringing the American and German entrepreneurship ecosystems closer together.

For this purpose, we have launched the Orrick Legal Ninja Series (OLNS). With this series, we will provide overviews on current legal trends and take deeper dives on certain legal topics that are particularly relevant for start-ups and their investors.

The OLNS will be co-authored by a multidisciplinary team of attorneys from our national and international offices. It is our goal to tap into the rich reservoir of the venture capital and technology law know-how of our international platform and make it available to the exciting German entrepreneurship and innovation scene

Why "*Ninja Series*"? This title might simply reflect the fact that some of us watched a little too much TV in the 1990s. But, seriously, "Ninja" has come to signify "a person who excels in a particular skill or activity." That's what the Orrick team strives to be when it comes to providing tailored advice to growing tech companies and their investors. We hope that the OLNS also empowers you to be Ninja entrepreneurs.

We hope you enjoy the new edition of the third issue of our OLNS. If you would like to discuss it further, please contact us. We would love to learn about your experiences with these topics, so please share them with us. We constantly strive to evolve and grow in order to best serve our clients.

On behalf of the Orrick Team,

André Zimmermann

Head of Orrick's German Employment Law Practice

A. Employment Law

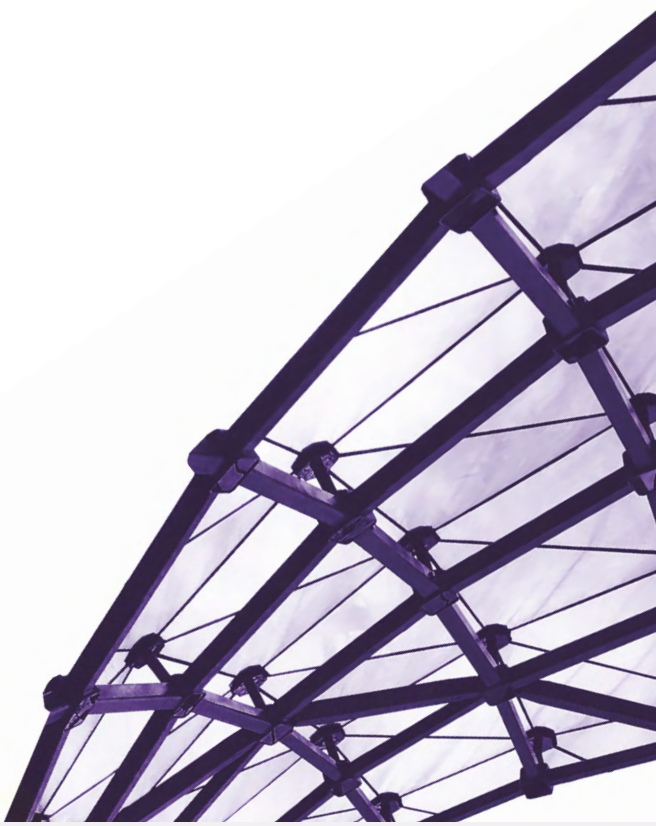
I. Introduction

At start-up, young tech companies focus entirely on their products, want to pitch and bring VC investors on board. Every euro in the budget counts, personnel is often limited, and legal advice seems expensive. For these understandable reasons, legal issues are not always top of mind.

But trial and error with employment law can quickly become expensive for founders[2] and young companies. If a key employee with important know-how moves to a competitor and no effective post-contractual non-compete has been agreed, the loss goes beyond merely the employee, to all the know-how he takes with him. A systematic approach and early legal advice guard against pitfalls like this.

We have many years of experience helping German and international tech companies get off the ground – from hiring their first employees, through several financing rounds, to their IPO. In our OLNS#9, we've compiled our experiences and practical advice for starting and scaling a tech company.

Through the Orrick Legal Ninja Series, we would like to share our experience in employment law with founders and young tech companies and focus on some particularly critical issues.



1. We generally refer to founders as female, but male founders are always included. Note that if we use the masculine form in the following this is done for better readability, and we always refer to all genders.

II. The Founders' Legal Status

In Germany, founding a company shortly after school or during university is the exception rather than the rule. German founder's average age is around 38. This means, founders often are another company's employees when founding. This can cause problems.

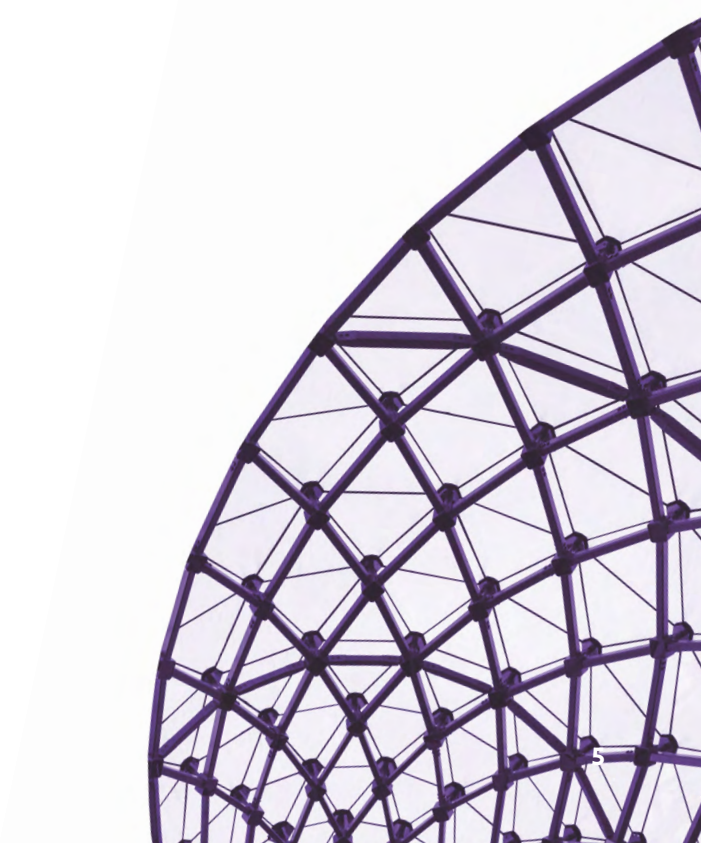
1. FOUNDING WHILE IN AN EXISTING EMPLOYMENT RELATIONSHIP

Generally, every employee is subject to a non-compete during his employment, even if not explicitly agreed in the employment contract. If the founder intends to operate her start-up in the same market as her employer, violation of this non-compete is very likely. If the founder has developed the start-up's business model, even a novel one, while with her employer, or even if it is based on the knowledge she has gained through her work, her employer might have first claims on the new development. An employment contract can even stipulate that secondary activities, including founding a company, are permitted only with the employer's prior consent.

To avoid claims for damages and even claims to her work, a founder should get professional legal advice early. Where appropriate, she should seek a written agreement with the employer stating that the founding and start-up activities do not violate the non-compete and granting the necessary consent.

For the specifics of start-ups involving the use of intellectual property created with the help of a university or research institute, see OLNS#10 University Entrepreneurship & Spin-offs in Germany.

You can find all editions of the OLNS here: https://www.orrick.com/en/Practices/Orrick-Legal-Ninja-Series-OLNS.



2. FOUNDERS AS (SHAREHOLDER) MANAGING DIRECTORS

n Germany, most start-ups are founded as a limited liability company (GmbH) or an entrepreneurial company with limited liability (UG). You may also choose from other legal forms available, like a partnership under civil law (GbR) or sole proprietorship. As a rule, the limitation of liability speaks for a GmbH or UG.

In a start-up's early stages, founders often surprisingly forget one important point – themselves. Are they founders only? Or also shareholders or managing directors? Or even all three?

The founders usually participate in the start-up's equity. They are active employees, and they are shareholders. They drive the business, often without a managing director service contract that would give them a sound legal basis. And if they do have one, it is often missing essential regulations or does not fit properly – it might fit third-party managing directors (without equity participation, *i.e.* not shareholders), while the founders are acting as shareholder managing directors.

Frequently, founders will use a free template available online or one borrowed from a fellow start-up – better than nothing, but far from ideal. Professional investors will look closely at the documentation of the founders' contractual relationships, so it's got to be right.

Typically, one of the founders becomes a managing director as well as a shareholder in her start-up, acting as a shareholder managing director, meaning a managing director with equity participation. But, at least after some time, it might make sense not to do this, but rather to bring in a third party as an external or third-party managing director, meaning a managing director without equity participation. If the founders lack certain knowledge, or if a third party knows the market particularly well or enjoys a high reputation, this course might be preferable.

There may be two shareholder and/or third-party managing directors, or even several (it's rare but happens). In such a case, the different responsibilities and the question of representation should be clarified: Should one managing director be able to conclude contracts, or must both (or all) do so together?

CHECKLIST: WHAT SHOULD TYPICALLY BE COVERED AT THE VERY LEAST IN A MANAGING DIRECTOR SERVICE CONTRACT?

- ☑ Job title, (*e.g.*, CFO), place of services
- ☑ Authority to manage and represent the company (if applicable, including exemption from the prohibition on self-contracting according to sec. 181 BGB)
- ☑ List of transactions requiring approval
- ☑ Tasks and duties
- ☑ Secondary activities
- ☑ Non-compete during the term of the service contract and, if applicable, afterwards (consider contractual penalty for breaches)
- ☑ Remuneration (fixed salary, variable remuneration) and other benefits (*e.g.*, company car, D&O insurance, other insurance)
- ☑ Vacation
- ☑ Expenses and travel costs
- ☑ Sick pay
- ☑ Non-disclosure obligations
- ☑ Inventions, copyrights and other intellectual property rights
- ☑ Term, notice periods and release (garden leave)
- ☑ Return of work equipment, documents and data
- ☑ Cut-off periods
- ☑ Customary final provisions

3. SOCIAL SECURITY OBLIGATIONS OF THE SHAREHOLDER MANAGING DIRECTORS?

One common issue is the social security classification of managing directors. Must the company pay social security contributions for them? Third-party managing directors are outright employees, so the answer for them is yes, social security contributions must be paid on top of their salary.

For shareholder managing directors, it depends – social security contributions might not be required if they have significant influence on the company through their shareholder position and can sidestep the shareholders' instructions.

Exemption from social security contributions for a shareholder managing director can come from two directions: if his equity participation (including indirect participation) is at least 50 percent, or if a blocking minority in the articles of association or voting rights agreements give him an exemption because he holds decisive influence even with a lower equity participation. It depends on the individual case. While the requirements are fairly high, a target-oriented wording of the corporate documentation and the service contracts – and implementation in practice – can dramatically raise the chances of exemption.

And the assessment of the social security responsibility may change over time. For example, if the equity structure changes because new shareholders come onboard in financing rounds, then the question of the social security responsibility of the shareholder managing directors must be visited anew.

For shareholder managing directors with minority shareholdings, the requirements imposed by case law on the social security exemption have recently become stricter, with social insurance institutions increasingly asserting additional claims following company audits. Together with the default surcharges, these amounts can impose a major financial burden on the start-up, as the company alone is liable (employee and employer portion!) for the past four years.

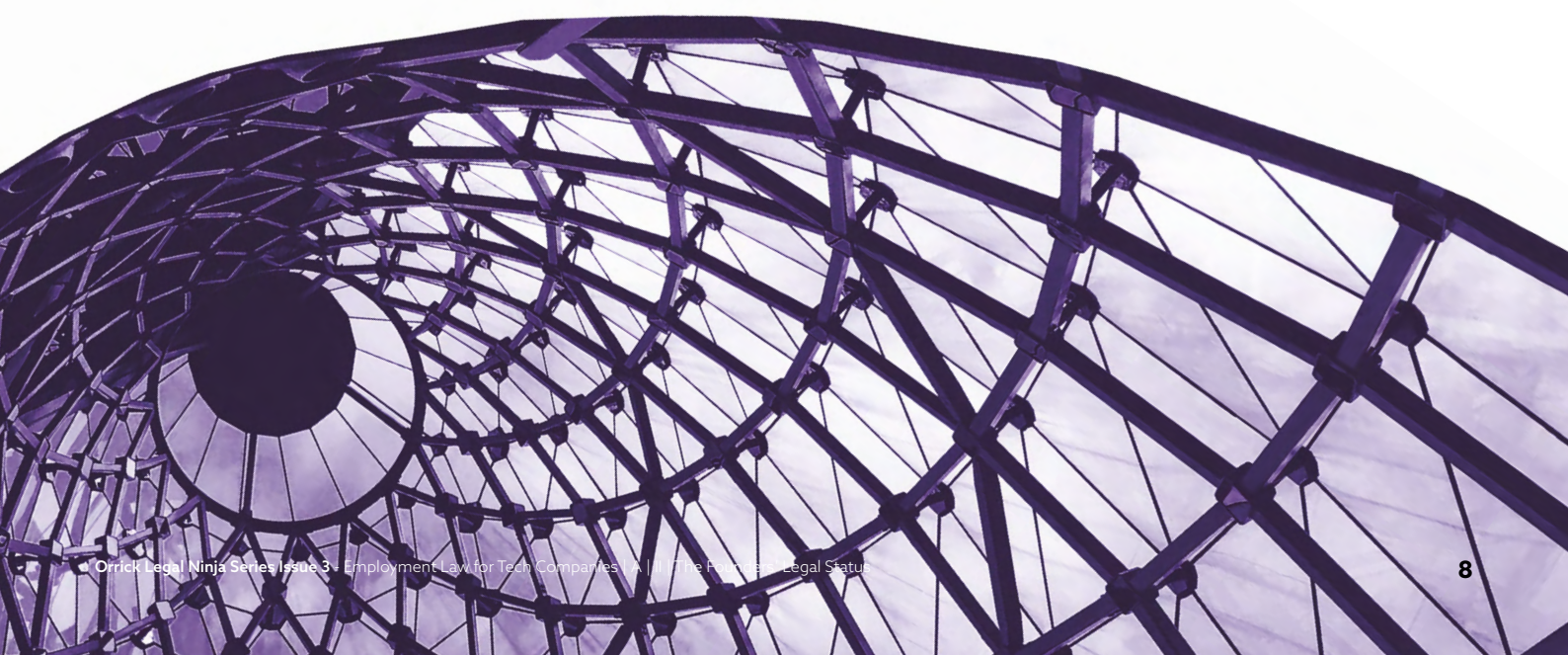
4. SECURITY THROUGH STATUS CLEARANCE PROCEDURE

Shareholder managing directors uncertain of their status can get clarification on their social security responsibility via a status clearance procedure at the clearing office of the German pension insurance. The form package, with directions for completing it, is available on the Deutsche Rentenversicherung Bund homepage at www.deutsche-rentenversicherung.de (in German only).

Applications can be sent electronically to the clearing office (Bundesweite-Clearingstelle@drv-bund.de-mail.de). All documents relating to the request must be attached, particularly service contracts, articles of association and extracts from the commercial register. After an initial examination, the clearing office will request further information and, if necessary, documents within a set time period. If the clearing office assumes a responsibility to pay social security contributions, a hearing is held before a decision is made.

A founder should already have an expert involved when submitting the application. Unfavorable information provided at this stage can be difficult to correct later. And the whole procedure may take much longer than expected. In simple cases, a decision on a professionally prepared application usually comes within four to six weeks, while more complex cases (*e.g.*, indirect participation, blocking minority) can take three to four months.

Status clearance may be applied only as long as the authorities have not initiated another administrative procedure.
The statutory pension insurance, for example, already considers an announced audit as the initiation of an administrative procedure.
As soon as doubts arise, the founders should act!



III. The First Team Members: Employees, Contractors, Trainees, Working Students ...

- At some point, every successful start-up exceeds the founders' manpower (and of course support by friends and family) – the team needs to grow.
- Staffing needs can be met in many ways – all with advantages and disadvantages. In addition to employees (full-time, part-time, fixed-term or permanent) and independent contractors ("contractors"[2]), young companies also like to use interns, working students and mini-jobbers.
- An expert can help with thinking about staffing options and drawing up a tailor-made concept.

1. EMPLOYEE OR CONTRACTOR?

Employee or contractor? That's the question management must decide – and decide correctly – for each team member in a start-up who is not an intern or working student (see below for these options). The decision must be made before the individual starts work. It's crucial to get this right.

Typically, young companies start mainly by hiring contractors and, after growth, move increasingly to employment contracts. Contractors seem cheaper, since the start-up doesn't have to pay social security contributions for them, and they don't enjoy the same employment protections as employees. The initial contractor period can also serve as an upstream probationary period, after which the company decides whether to offer the contractor an employment contract.

However, the correct classification as an employee or contractor is important right from the start: incorrectly classifying an employee as a contractor can have considerable effects on the company – from retroactive liability for taxes and social security contributions to reputation damage and even criminal liability of the managing directors (in case of intent).

2. That's the only term we use in the English version. Contractors are also referred to as independent contractors, subcontractors, consultants, freelancers or self-employed.

2. OVERVIEW OF THE MAIN CLASSIFICATION CRITERIA

Unfortunately, it's not always easy to determine whether team members are employees or contractors. One thing is clear: team members don't become contractors because they're called contractors (or a similar designation) or because the contract is called a "freelance contract" or a "consultancy contract". Rather, the decisive factor is how the contract is carried out in practice. The courts have established several criteria for classifying contracts, but they're not always uniformly applied and weighted. How a team member will be classified isn't always clearly predictable.

The most important criteria are the obligation to follow instructions at work and integration into the company's organization. If the team member receives small-step work instructions from you, cannot freely organize his working time, has the start-ups' business cards and e-mail address without being specifically identified as external, has a badge and unrestricted access to all rooms and internal networks, participates in all company events and receives further benefits – everything then indicates employee status, and this is a case of misclassification.

A case this clear is rare in practice. In reality, working arrangements often occupy a grey zone. The start-up needs to ensure that as few criteria as possible speak for employee status and as many as possible justify contractor status. To do this, management needs appropriate documentation, of course, but above all it needs to shape the actual working processes. It doesn't matter how good it looks on paper: even a perfect wording will never outweigh a noncompliant practice, possibly going on for years.

Awareness of the issues involved should be present at all levels (consider regular trainings). On the one hand, this awareness should direct the processes and structures directing the drafting of the contracts, but on the other hand, and most importantly, it should determine the use of contractors on a day-to-day basis. A very easy way to implement some control at the contractual level with contractors is a regular contractor self-certification, a confirmation by the contractor that he fulfils certain requirements, like having other customers with whom he generates a not inconsiderable portion of his revenue

> When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.[3]

3. The duck test is a form of abductive reasoning. The poet James Whitcomb Riley may have coined the phrase when he wrote this poem. It implies that a person can identify an unknown subject by observing that subject's habitual characteristics (text slightly modified taken from Wikipedia). If you apply that to the employee status, the individual is probably an employee as a matter of law if the relationship has all the characteristics of employment, no matter what label the parties put on it..

CHECKLIST: EMPLOYEE VS. CONTRACTOR

FACTORS INDICATING EMPLOYEE STATUS:

The company's right to issue instructions regarding

- ☑ Place of work
- ☑ Working time
- ☑ Type and manner of the activity

Integration into organization, *e.g.*, recognizable by

- ☑ Organizational and hierarchical integration
- ☑ Inclusion in org charts, telephone directories and e-mail distribution lists
- ☑ Allocation of office space
- ☑ Temporary substitution of permanent employees (*e.g.*, vacation, illness)
- ☑ Providing laptop and smartphone
- ☑ Participation in company events
- ☑ Granting the same benefits (*e.g.*, free or discounted meals, gym discounts)
- ☑ Business card and e-mail address without clearly indicating external status
- ☑ Unrestricted access to internal databases and communication platforms such as Dropbox, Slack, Gmail, Citrix

Additional criteria

- ☑ Identical activity as employees
- ☑ Activity only for one company
- ☑ Company "owns" individual's labor
- ☑ Detailed reporting obligations
- ☑ Monthly fixed salary
- ☑ Granting of typical employer benefits (*e.g.*, vacation, sick pay, overtime pay)
- ☑ Keeping personnel files

FACTORS INDICATING CONTRACTOR STATUS:

No company right to issue instructions regarding place of work, working time and manner of the activity

No integration into organization, in particular

- ☑ No office of his own in the company
- ☑ No substitution of employees (*e.g.*, vacation, illness)
- ☑ Use of personal work equipment (laptop, smartphone)
- ☑ No integration into organization and hierarchy
- ☑ No participation in company events
- ☑ No granting of benefits received by employees
- ☑ No inclusion in org charts, telephone directories, e-mail distribution lists
- ☑ No business card and e-mail address of the company unless with clear indication as external
- ☑ Restricted access to internal databases and communication platforms such as Dropbox, Slack, Gmail, Citrix

Additional criteria

- ☑ No comparable activity as an employee
- ☑ Activities for several companies
- ☑ Entrepreneurial market presence (*e.g.*, company-independent homepage, e-mail, business cards)
- ☑ Labor not "owned" by company but contracted for, permission to use staff
- ☑ No or limited reporting obligations
- ☑ No monthly fixed remuneration, but rather project-related remuneration or hourly fee
- ☑ Not granting typical employee benefits (*e.g.*, vacation, sick pay, overtime pay)
- ☑ Business registration

3. CONSEQUENCES OF MISCLASSIFICATION

Often, misclassifications become apparent only over time, as when negotiations with investors are underway. Professional investors will always examine the legal risks as part of their due diligence. A crowd of contractors who likely turn out to actually be employees after the due diligence can quickly dampen the initial desire for an investment, and may significantly influence the conditions of the transaction due to the associated financial risks (notably subsequent payment of social security contributions). In addition, misclassification can be uncovered in a social security audit or when separating from a (supposed) contractor who is filing a lawsuit claiming to be in fact an employee.

Misclassification cases bring high financial risks: Social security contributions for pension, health, unemployment and nursing care insurance must be paid for up to four years (with intent to even 30 years!). The company is liable for both its share of social security contributions and the employee's share. Late payment surcharges and interests due come into play also.

There are tax consequences, too: The tax authorities can make the company pay wage taxes that haven't been paid – the possibility of recourse against the employee in practice often comes to nothing. The company must also reimburse the tax authorities for the input tax deduction from the contractor's VAT.

In addition to these considerable financial burdens, the new status of contractors as employees comes into play: They are entitled to all employee rights – vacation, sick pay and minimum wage as well as dismissal protection – retroactively from the beginning of the contractual relationship to the limit of the statute of limitations. In addition to these legal and financial risks, there are risks to the company's reputation that could hamper further growth.

A very similar problem can come up if, instead of hiring a contractor directly, you choose a service provider who provides services based on a contract for works or for services. In many cases, the provider will be acting like a de facto temporary employment agency and the individual, who is technically employed by the provider, will be employed like the start-up's own employees, be subject to work instructions and integrated into the company's organization. That's considered illegal personnel leasing, which will lead to very similar liability risks for your start-up as misclassifying contractors. You should, therefore, also look closely at these arrangements.

Overall, there are good reasons for young technology companies to address misclassification intensively at an early stage, and to examine realistically which functions can actually be filled by contractors. If in doubt, the only thing that helps here is a status clearance procedure.

4. USING INTERNS AND WORKING STUDENTS

Using interns and working students is a good way to introduce young talents to the company and get to know each other. However, both have disadvantages and risks, notably if they are used to replace regular employees.

5. WHAT'S IMPORTANT WHEN USING INTERNS

By definition, interns temporarily work for a company to acquire the practical knowledge, skills and experience necessary to prepare for a – usually academic – profession. Interns are not considered employees, as the focus is not on the work performance but on the training.

Here, too, it isn't enough to agree on an "internship contract" if the intern in practice works as an employee. In such a pseudo internship, the intern will be entitled to the same salary (and other benefits) as other comparable employees and will enjoy all employment law protection. Both – documentation and everyday practice – must be in line with the training purpose of an internship. Record the training purpose in an internship plan and implement in practice the contractual relationship the same way.

In principle, the Minimum Wage Act (*Mindestlohngesetz – MiLoG*) applies to interns. The minimum wage is currently EUR 12 gross (from October 1, 2022) per working hour. An unpaid internship can be offered only in particular cases, for example to students and apprentices prescribed by the training regulations (compulsory internship), or in case of an orientation internship of up to three months before starting studies or an apprenticeship.

6. USING WORKING STUDENTS AS ANOTHER OPTION

Working students usually work full-time during the semester break or part-time during the semester. Unlike interns, working students are considered employees, as the focus is not on training but on work performance. Therefore, in principle, all employment law regulations apply – sick pay, minimum vacation, dismissal protection and fixed-term employment. The minimum wage also applies to working students.

Working students, however, differ in another way: the so-called working student privilege. This means the company doesn't have to pay social security contributions for them if they're enrolled at a university and their weekly working time doesn't exceed 20 hours (40 hours during semester breaks). This is a significant financial advantage with pension contributions still payable though, unless it's a case of marginal employment and the student has been exempted.

The qualification requirements for the working student privilege should be well documented in the working student contract and should be observed in practice, above all the maximum time limits. The contract should provide that the student submit a certificate of matriculation each semester. If the working student privilege is lost, for example because the student is not enrolled at all times, social security contributions must be paid in arrears by the company, which can quickly become expensive if several working students are employed.

QUICK CHECK – INTERNS AND WORKING STUDENTS

MINIMUM WAGE FOR INTERNS?

1. Voluntary or compulsory internship?
2. If voluntary: orientation internship (three months max.) before starting studies?
3. If compulsory: during and not before or after the studies?

If question 2 or 3 is answered yes, the intern is probably not entitled to the minimum wage.

SOCIAL SECURITY CONTRIBUTIONS FOR INTERNS?

- Compulsory internship? No social security obligation.
- Voluntary internship? Social insurance is compulsory in principle, but the working student privilege may apply.

WHAT IS TO BE CONSIDERED WHEN USING WORKING STUDENTS?

- Time limit observed? (max. 20 hours/week or 40 hours/week in semester breaks)
- Attention: Parallel occupations are added together!
- Registered at a university? (No doctoral student, no more than 25 semesters, no vacation semester, no part-time studies)
- Where does the health insurance exist? (In the case of family insurance via parents, no more than EUR 520 may be earned)

7. MARGINAL EMPLOYMENT

With marginal employment an employee doesn't earn more than EUR 520 per month, *i.e.* EUR 6,240 per year (from October 1, 2022) (marginal remuneration), or his employment is limited from the outset to two months or 50 calendar days in a calendar year and isn't exercised professionally (marginal period of time).

In general, marginal employment is suitable for short-term projects. Marginally employed employees can be used flexibly to cover peak periods, and their use is also privileged under social security law in certain respects. However, the working time and the salary of one employee's several marginal employments are added together, which means that this employment option is usually out of the question for qualified employees.

Marginally employed employees generally enjoy the same rights as full-time employees, for example sick pay. In particular, the Minimum Wage Act also applies to them, so that a maximum of 43,33 hours (from October 1, 2022) may be worked per month (in case of marginal remuneration). The Minimum Wage Act also provides for recording and storage obligations with regard to the daily working hours of marginally employed employees. Violations of these obligations can be punished with a fine of up to EUR 30,000.

IV. Drafting Your First Employment Contract

The first employment contract is often taken from a free online sample or a template from a fellow start-up. Both are better than no contract at all – which happens surprisingly often – but not ideal.

CAN WE SIGN THIS WITH DOCUSIGN?

DocuSign, PandaDoc and other forms of e-signing are useful tools.
If the law requires written form, e-signing is not enough though.

THE FOLLOWING DOCUMENTS CAN BE SIGNED WITH DOCUSIGN, PANDADOC, ETC.:

- Managing director service contracts
- Agreements on additional benefits, such as virtual options or bonus payments
- Employment contracts (exceptions: fixed-term employment contracts and post-contractual non-competes)
- Warnings
- Confirmation of resignation by the employee
- Winding-up agreements

THE FOLLOWING DOCUMENTS CANNOT BE SIGNED WITH DOCUSIGN, PANDADOC, ETC.:

- Fixed-term employment contracts
- Apprenticeship contracts
- Post-contractual non-competes
- Notices of termination
- Separation agreements
- References
- Employment contracts that contain conditions subsequent (such as that a foreign employee must have a valid residence permit)

1. ARE THERE CERTAIN FORMAL REQUIREMENTS FOR THE CONCLUSION OF EMPLOYMENT CONTRACTS?

No. German employment law does not require employment contracts to have a specific form. An oral agreement is enough, as is the simple commencement of work or the exchange of e-mails. The use of DocuSign or other e-signing solutions for employment contracts generally also works.

But: At the latest at the start date, the employee must be given a signed record of the essential contractual conditions by the employer. As of August 1, 2022, a violation of this is even punishable by a fine of up to EUR 2,000 per violation.

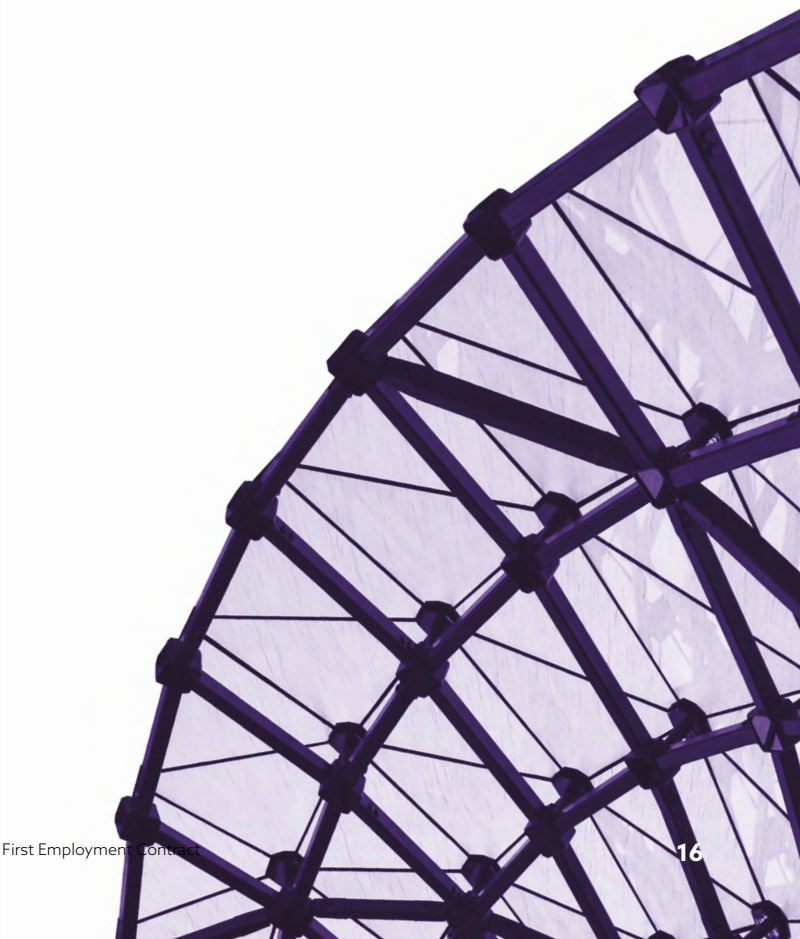
The mandatory content of the record of the essential contractual conditions of the employment relationship includes, among others:

- the duration of the probationary period
- the due date for salary payment
- the agreed working hours
- agreed rest breaks
- the possibility of ordering overtime and its conditions
- any company pension entitlements
- the procedure to be followed when terminating employment
- at least the reference to the written form requirement and the notice periods
- as well as the deadline for filing an action for protection against unfair dismissal.

If you want to continue signing employment contracts with e-signing solutions, you must in any case hand over a hand-signed record to the employee on the first day of work at the latest or send it to him by mail.

And beware: Some agreements must comply with the statutory written form to be effective. This means wet-ink signatures of employer and employee. Notably, this applies to fixed-term employment contracts and post-contractual non-competes. If, for example, a fixed-term contract is agreed orally and fixed in writing only after the employee starts, an unlimited employment relationship has already been established. We have summarized further details on fixed-term employment below.

As a rule, it's advisable to conclude a written employment contract straightaway. At least in Germany, even today a signed physical document is still expected.



2. WHICH LANGUAGE SHOULD WE CHOOSE?

English is now the (un)official corporate language in most young tech companies. Employment contracts and other agreements with employees can also be fully drafted in English. There is no obligation to draw up employment contracts in German. However, a German translation will need to be provided in case of litigation or if an authority requires so.

It's not at all uncommon for the entire employment documentation to be prepared in English only at the outset, to keep the documentation lean and efforts to a minimum. If in doubt, start-ups should opt for English or bilingual versions. This makes it easier to attract international talent and due diligence will be much easier for VC investors from outside Germany.

3. WHAT ABOUT TEMPLATES FROM THE INTERNET?

We certainly don't want to condemn all templates available online. They often contain the essential provisions for an employment contract. And in general, one can say: A template employment contract is usually better than no written employment contract at all. However, the quality of these template contracts varies a great deal, and their use often turns out costly because they are not adapted to the company. Unfortunately, this is always noticed only in hindsight.

For example, tech companies need confidentiality agreements and conditions on the transfer of intellectual property rights. In freely available templates, such conditions often are not included, or included very poorly, so that they don't fit the company or the role. In other cases, several blanks should be filled in and alternative clauses chosen, but neither is done before execution. Any such ambiguity will be to the company's detriment if challenged.

Much German employment law is regulated by case law. Judgments often result in clauses in employment contracts suddenly becoming ineffective that have been used as a matter of course for years. As general terms and conditions, conditions in employment contracts are subject to special judicial review: they must not place the employee at an unreasonable disadvantage and must be clear and comprehensible. The courts apply strict standards here. However, it is often not possible to tell from a template what state of the case law pertains – or whether the author has taken case law into account at all.

These issues will of course not always mean the difference between a start-up's success or failure. But they frequently cause unpleasant and often costly surprises.

Draw up bespoke (bilingual) employment contracts for key employees and important know-how owners with external support. These drafts can then be adapted with little effort so that they are also suitable for other positions, which will go easy on the budget.

4. WHO'S GONNA SIGN THIS?

A few thoughts on scope and language. What is not needed is a 36-page bilingual employment contract full of legalese with four attachments covering all eventualities up to the termination of employment upon invalidity and retirement, which discourages talent and does not exactly convey a young company's image. Draft your employment contracts in an easy-to-understand manner. Eliminate superfluous wording. The employment contract suggests your corporate culture, a crucial factor in attracting talent. Content and language should match your corporate culture.

Lawyers love security and notoriously base their thinking on the worst case scenario, which is then covered in detail in templates. Many conditions that you'll come across in common templates today can easily be dropped, especially for young companies, because the number of real problematic cases may be in the per mil region. If you dispense with these superfluous conditions, the number of pages can easily be cut in half. Use external help to decide which terms are really important to you, which are nice to have and which you can drop. Brevity and clarity help with recruiting. Keep it simple!

Use a lean employment contract with essential terms in clear wording that reflects your company's spirit. Addressing the employee informally on a first-name basis is allowed, too!

CHECKLIST: WHAT SHOULD THE EMPLOYMENT CONTRACT COVER AT LEAST?

- ☑ Name and address of employee and employer
- ☑ Job title (*e.g.*, Software Developer), work location/home office
- ☑ Start date, probationary period (maximum 6 months)
- ☑ Job description
- ☑ Relocation clause
- ☑ Remuneration (fixed salary, variable remuneration) and other benefits, overtime compensation
- ☑ Working time, secondary occupations
- ☑ Non-compete (contractual and where applicable post-contractual for key employees)
- ☑ Vacation
- ☑ Expenses and travel costs
- ☑ Sick pay
- ☑ Confidentiality obligations
- ☑ Inventions, copyrights and other property rights
- ☑ Use of telephone, EDP and e-mail (private use permitted?)
- ☑ Notice periods, release (garden leave)
- ☑ Return of work equipment, documents and data
- ☑ Cut-off periods
- ☑ Customary final provisions

5. WHAT LEGAL RESTRICTIONS APPLY IN TERMS OF WORKING HOURS?

The Working Time Act (*Arbeitszeitgesetz – ArbZG*) sets out mandatory requirements and limits for working time. In principle, it applies to all employees in Germany (except executives). Regulations that violate the law are ineffective. Companies tolerating more than the permitted working time or that do not comply with other statutory requirements may face fines of up to EUR 15,000 per breach. Unfortunately, the rather strict rules of the Working Time Act have not yet been adapted to the modern working world and generally give companies little flexibility.

6. MAXIMUM WORKING HOURS, SUNDAYS AND PUBLIC HOLIDAYS

As a rule, working time may not be more than eight hours per working day. Working time means the time from the beginning to the end of daily work, not including breaks. Working days are from Monday to Saturday, however, in most tech companies a five-day week is common.

Working time can be extended to up to ten hours per working day if it does not exceed an average of eight hours per working day within six calendar months or within 24 weeks.

Work on Sundays and public holidays is generally prohibited. There is an extensive list of exceptions though, but it is not relevant for most start-ups.

7. REST BREAKS AND REST TIME

The law regulates rest breaks in detail. Employees may not work more than six hours without a break. After more than six work hours, working time must be interrupted by a predetermined break of at least 30 minutes, which can be divided into two 15 minute units. If the working time is more than nine hours, the break must be at least 45 minutes.

At the end of the working day, the employee must have an uninterrupted, eleven-hour rest period. During this period, he must not be subject to any work-related requests that would prevent him from enjoying his spare time freely. That means: also, no checking of e-mails.

Attention: The Working Time Act obliges the employer to record employees' working hours once they exceed eight hours. These records must be kept for at least two years. Violations of this recording obligation can be punished with fines up to EUR 15,000.

Quite recently, however, the Federal Labor Court ruled that, from the point of view of occupational health and safety law, a complete recording of working time may be required. In which cases and to what extent exactly this has to be done is not yet entirely clear; this will only become apparent in practice over the coming years. A new law on this is expected to be passed in early 2023.

You should, therefore , keep an eye on this and seek legal advice.

The obligations of the Working Time Act (only) affect the company. It is therefore not enough to point this out to the employees and to trust they will always comply. In order to ensure that urgently required tasks can also be completed outside of normal working hours, it's often possible to find a suitable solution in compliance with the Working Time Act. Besides customary arrangements such as flexitime, on-call duty may be an option to consider for young tech companies.

8. HOW ARE WE GONNA HANDLE OVERTIME?

Overtime is of course common in start-ups. If the salary does not exceed the income threshold of the statutory pension insurance[4], employees are regularly entitled to overtime pay or time off in lieu.

To limit the financial burden of overtime, the employment contract should include a provision on partial compensation for overtime through the fixed salary, beyond that provide for time off in lieu and an effective cut-off period. Such a clause needs to set out the number of overtime hours to be compensated by the fixed salary and must be in proportion to the regular working time; otherwise it is ineffective. The exact number of hours of overtime that can be compensated by fixed salary has not yet been clarified. We do not recommend exceeding 20 percent of the regular weekly or monthly working hours. Also, it's important that the statutory minimum wage must not be undercut if overtime is included.

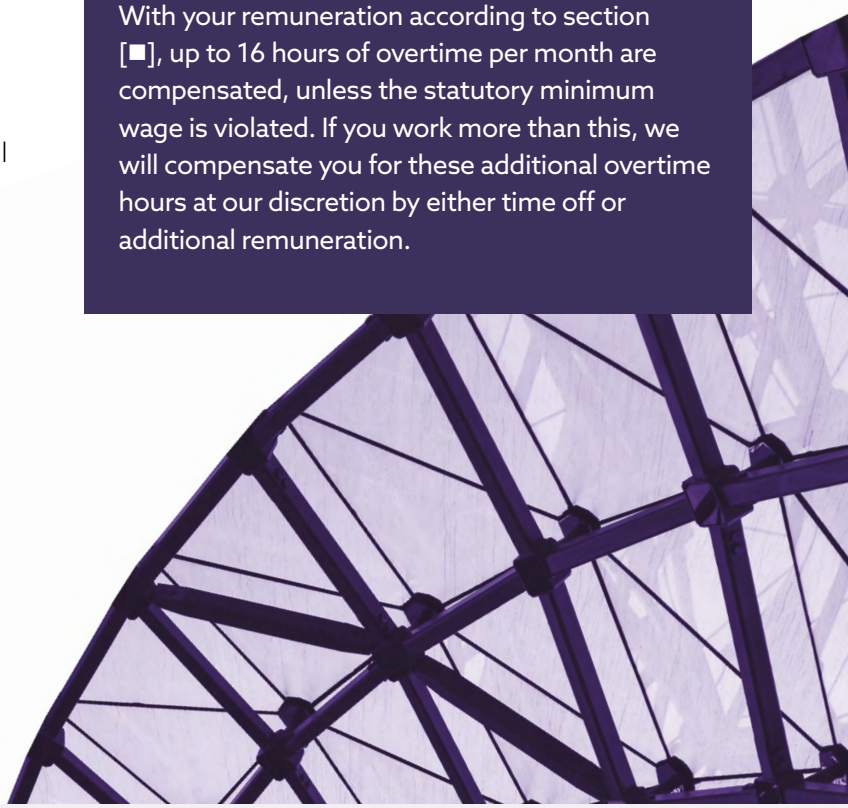
But often companies don't want to include these necessary limitations in overtime clauses. They can give the impression that overtime will occur to the extent mentioned, which can be a put-off. Or, it is dreaded, the wording may even lead the employee to the idea of demanding overtime pay and writing all overtime down in detail in the first place.

If an effective cut-off period has been agreed, an (ineffective) lump-sum compensation clause without the restrictions set out above may be used. A cut-off period determines that a claim must be asserted within a certain period, or it expires. The time for asserting the claim (*e.g.*, for overtime pay) must be at least three months.

If the employment contract contains an effective cut-off period, the financial risk for the start-up is very moderate and manageable: in practice, employees claim overtime pay only at the end of the employment relationship, not during it. Therefore, if a three-month cut-off period has been agreed, overtime pay is due for three months only and not for several years.

A provision for compensation of overtime with a regular weekly working time of 40 hours could read:

> With your remuneration according to section [■], up to 16 hours of overtime per month are compensated, unless the statutory minimum wage is violated. If you work more than this, we will compensate you for these additional overtime hours at our discretion by either time off or additional remuneration.



4. 2023: EUR 87.600 (west) und EUR 85.200 (east). The figures refer to the annual gross income.

9. SPECIAL ARRANGEMENTS FOR CERTAIN POSITIONS

In certain cases, you should consider including special arrangements.

At the very least, the employment contracts of key employees and know-how owners in the R&D sector should contain specific language on the transfer of copyright or other protected work results or the granting of corresponding rights of use and exploitation. For patented or otherwise protected inventions, the Employee Inventions Act (*Arbeitnehmererfindungsgesetz – ArbNErfG*) contains mandatory provisions that may not be waived.

To prevent loss of customers to competitors, it's worth considering post-contractual non-competes (to be covered later) for key employees in R&D and sales and management positions.

10. WHAT RULES APPLY TO FIXED-TERM CONTRACTS?

Many start-ups prefer fixed-term contracts at the beginning. They give more flexibility, because often it's not clear at the outset whether the position is still needed (or can still be paid for) one year after the contract is concluded. Effective fixed-term contracts also protect the growing start-up from expensive separations if the requirements for dismissal protection under the Dismissal Protection Act are met (see below for more). In the case of a (valid) fixed-term contract, the employment relationship automatically ends at the agreed time without the need for dismissal (or a severance payment).

However, fixed-term contracts may also cause a few problems. They are not suitable for all positions. For example, talent in the technology sector will almost always seek (and usually find) a permanent position. Plus, extensive use of fixed-term contracts will hardly increase your start-ups' employer attractiveness and could trigger high team turnover. If the start-up in the early-stage phase has only a few team members, which is quite common, separation without severance pay is quick and easy anyway, so using fixed-term contracts doesn't bring any advantage at this stage. In the start-up's expansion stage, you may want to reconsider the use of fixed-term contracts.

You should think carefully about whether and how you use fixed-term contracts and adapt your decision to the start-up's development phase.

Be aware: Since August 1, 2022, the probationary period for fixed-term contracts must be in proportion to the duration of the fixed-term contract and the type of work. However, the law does not provide any further details on this relation. We do not consider a three-month probationary period for a fixed-term contract of two years to be unreasonable.

11. FIXED-TERM CONTRACTS MUST BE IN WRITTEN FORM

Fixed-term contracts must be concluded in written form, *i.e.*, with both parties' wet-ink signatures on a physical document. Fixed terms documented only in e-mails or WhatsApp or signed only with DocuSign, PandaDoc etc. are invalid. As a consequence, an indefinite employment relationship is created.

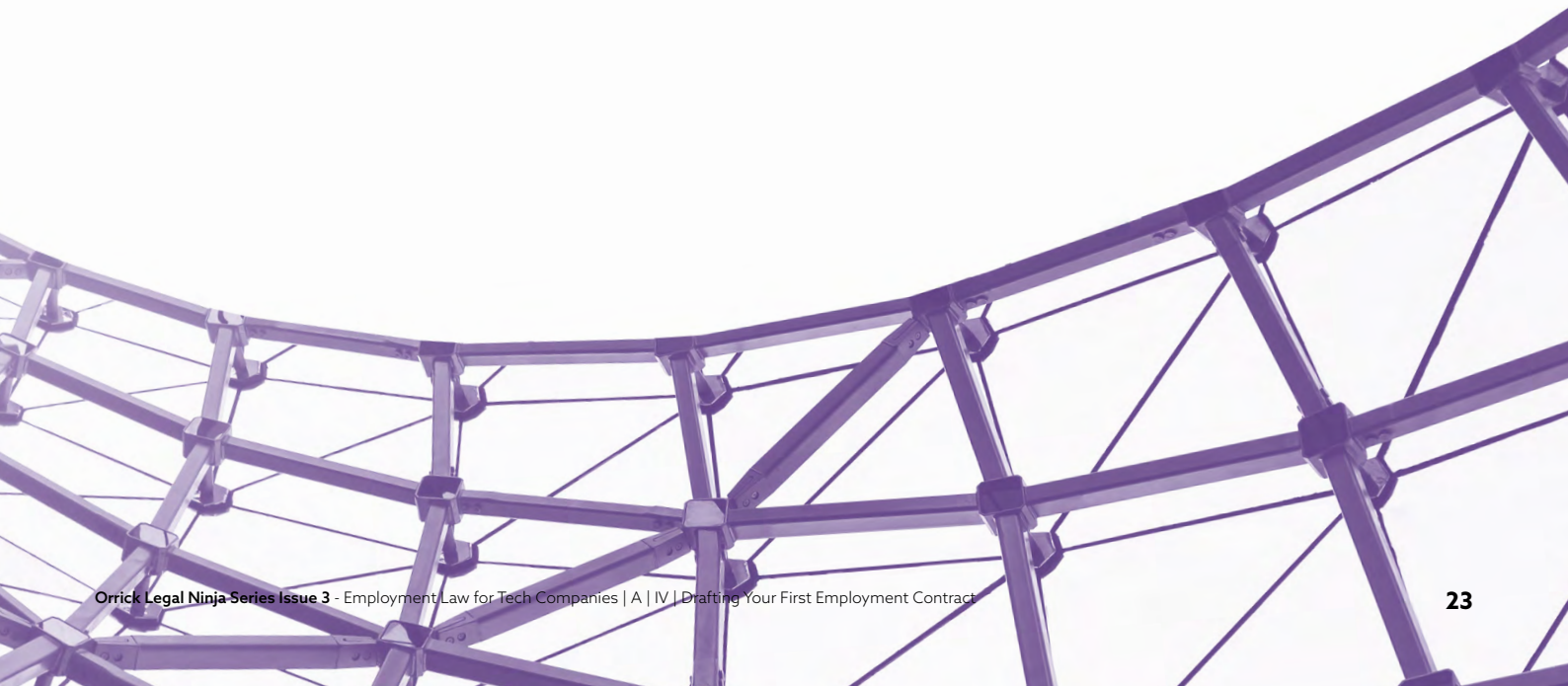
ATTENTION:
A fixed-term contract without objective grounds can only be effectively agreed upon in written form before the actual start of employment.

12. FIXED-TERM CONTRACTS ON OBJECTIVE GROUNDS

The key question with fixed-term contracts always is whether there are objective grounds for the fixed term. Objective grounds can be temporary needs (*e.g.*, a temporary project), another employee's temporary replacement (classic: parental leave) or the employee's specific wish for a temporary role (there are high requirements here!). In the event of a dispute, you must be able to prove one of these grounds.

In principle, fixed-term contracts with objective grounds can be agreed and extended as often as the parties wish. There is (currently) no statutory time limit or maximum number of extensions. However, as the number of extensions increases, so do the requirements that the company's need in fact is temporary only in case of litigation.

BUT BE CAREFUL:
Even if employers and employees assume there are objective grounds – a court can see it differently. The limits of the objective grounds are very narrow. If there isn't a clear case of objective grounds (*e.g.*, substitution during parental leave), you should rather use a fixed-term contract without objective grounds.



13. FIXED-TERM CONTRACTS WITHOUT OBJECTIVE GROUNDS FOR NEW HIRES

Start-ups often choose fixed-term contracts without objective grounds. In this case, a new hire's employment contract can be limited to two years without objective grounds, within which the contract can be extended up to three times. And start-ups younger than four years can even use a fixed-term contract without objective grounds for up to four years and extend it as often as they like within this period.

But there are also some points requiring your attention when using fixed-term contracts without objective grounds:

- Never agree a fixed-term contract without objective grounds with employees who have been employed before (fixed-term or permanent contract). Only in exceptional cases can a fixed-term contract without objective grounds be used, *e.g.*, if the previous employment dates back a very long time, which is not relevant for young tech companies.
- A fixed-term contract can be extended only three times, up to a total duration of two years. In the case of start-ups younger than four years, the contract can also be extended several times (no upper limit) up to a total duration of four years.
- Never extend the contract and make other changes to the contract (*e.g.*, adjustment of pay or working hours) at the same time. Two separate agreements with different dates should be made.
- Extensions must be seamless and agreed in writing before the agreed end date. Otherwise, an unlimited contract will be established if the employee is being employed beyond the original end date.

14. WHAT HAPPENS IF THE FIXED-TERM CONTRACT IS FLAWED?

Errors regarding the fixed term of a contract don't lead to the invalidity of the entire employment contract; only the fixed term will be ineffective, and a permanent employment contract is concluded (unintentionally).

If the employee wants to invoke the invalidity of the fixed-term contract, he must file an action before the labor court within three weeks after the fixed term's expiration. In other words: The fixed term does not become ineffective automatically.

V. Employee Incentives and Mobile Work

Young tech companies often cannot offer their employees too high a salary as they are still in the development phase and do not have sufficient financial resources. However, well-qualified employees are needed to contribute their know-how and drive the start-up forward. Therefore, modern forms of employee incentives play an important role in start-ups in order to offer employees an attractive working environment. The role models for this are, in particular, U.S. tech companies. Such incentive programs are also possible in Germany, but cannot always be transferred one-to-one into the German legal system and should therefore be individually adapted.

Employee stock option programs such as ESOPs (Employee Stock Option Programs) and VSOPs (Virtual Stock Option Programs) are among the most important levers for attracting top talent. We have addressed this topic in detail in OLNS#8 to give founders a comprehensive overview of the possibilities of equity-based and virtual employee stock option programs.

Below, you will find further options for increasing your employer attractiveness.

1. UNLIMITED PAID TIME-OFF

Unlimited PTO (PTO stands for "paid time off") means unlimited vacation. At many U.S. tech companies, so-called unlimited vacation is already a reality. With unlimited PTO, employees are not assigned a specific number of paid days off at the beginning of the year, but employees are given the freedom to take time off as needed – as long as it does not disrupt business operations. This provides employees with great flexibility and and is often an asset in employer attractiveness. Many Germany-based startups are considering introducing unlimited vacation as well – or have already done so.

However, we advise caution here in the implementation, as under German vacation law, some regulations are stricter than in the US. For example, the German Federal Vacation Act (*Bundesurlaubsgesetz – BUrlG*) requires minimum vacation of 20 days per year, the possibility of carrying over vacation to the following year in certain cases, and compensation for any unused vacation upon termination of employment. While granting "unlimited vacation" in the U.S. may significantly ease the administrative burden for the employer(applying for vacation, writing down and tracking vacation days, etc.) this goal can hardly be achieved in Germany. Recording vacation remains an important task for every employer in order to be able to prove compliance with the statutory minimum vacation entitlement of 20 days per year. Vacation tracking is also particularly advisable in view of the legal obligation to compensate for unused vacation when employment ends. To avoid disputes when compensating for untaken vacation in combination with unlimited vacation, it is important to agree on a vacation provision in the employment contract that takes into account unlimited vacation and differentiates it from the statutory minimum vacation entitlement.

Another problem with unlimited leave is that employees could use it in the event of illness, because it may seem easier to them to take unlimited PTO than to submit a sick note. Since employers are no longer obligated to continue paying salary after six weeks of absence, it isimportant that sick employees do not take unlimited PTO, but instead take sick leave.

Ultimately, this model carries some risks and potential for abuse too. Since most companies are currently already giving 28 to 30 vacation days per year as standard – *i.e.* considerably more than required by law – the model of unlimited vacation may no longer seem necessary. Still, it is possible to introduce unlimited PTO in Germany with the right contractual arrangement.

2. FLEXIBLE WORKING AND PERSONAL RESPONSIBILITY

Flexible working hours or mobile working, for example from a co-working café, from home or from abroad? All this is not far-fetched nowadays, especially in the Corona pandemic's wake. Allowing flexible working models in terms of time and place can make employees happier – and is in line with today's understanding of a globalized working world. However, there are some important aspects of mobile working (including not only the home office, but any kind of mobile working) that need to be considered.

Contractual provisions are important, this is the only way to ensure that the legal requirements of mobile work are met. Does the employee have to come to the workplace if the company deems it necessary? Does the employee receive reimbursement for his expenses in the "mobile office" (*e.g.* electricity, Internet and equipment)? And what if the employee has to travel from the mobile office to the workplace to attend a meeting? Are travel expenses reimbursed and does the trip count as working time? All of this usually depends on the specific arrangement and can vary from case to case. For example, if the employee is not provided with a workplace in the office, it is very likely that the company will have to reimburse travel expenses to the company workplace and other expenses. Contractual agreements bring more clarity and avoid disputes, misunderstandings and frustration.

Other important points are social security and taxes. Cross-border situations are not uncommon today. Especially employees from the tech sector, whose work is possible with only a laptop and from anywhere, often want to work from another country for personal reasons. However, the company must be careful not to breach its employer obligations abroad, because it cannot be ruled out that, in the case of mobile work abroad, taxes and social security contributions must also be paid in that country for the employee working there.

This will often depend on the duration of the stay abroad. Employees who work in other European countries and want to remain socially insured in Germany require an A1 certificate from the responsible authority. This usually requires an agreement between the company and the employee and, of course, the requirements for the A1 certificate must be met. In no case can the work abroad be permanent, because then German social security scheme will not apply. In non-European countries it is more complicated, because there are no uniform regulations as in the EU. If a bilateral social security agreement exists between Germany and the selected it can be ensured that the employee and the company only have to pay social security contributions in one of the two countries. If there is no such agreement, it may even be the case that there is a social security obligation in both countries and the company must also meet its payment obligations abroad. This must be checked for each individual case, in case of doubt also by a foreign lawyer. To avoid complicated constellations, it is generally advisable to allow the possibility of mobile work only in Germany. Activities abroad should always be limited in time. However, if this does not sufficiently take into account the employees' interests, companies must in any case know exactly which working model the employee chooses so that they can meet their social security and tax obligations in Germany and abroad.

Furthermore, policies must be put in place to protect the company's confidential information and data, because mobile working is now associated with a loss of the company's ability to exercise control. Employees must know how to secure and protect the company's data, especially from third-party interference. This is especially true if they use their laptop in public places or their private device in the mobile office. The company must take the appropriate precautions for IT security, at best with clear instructions in policies.

Finally, occupational health and safety also plays an important role in mobile work. The company remains responsible for this even if the employee is not working on-site at the company at all. This aspect, too, should either be precisely covered by company guidelines or agreed individually with the employee. There should be a separate risk assessment for employees in mobile work and employees should be informed about what measures they can take in the mobile office to have a safe workplace. Because of the loss of control, this requires a lot of cooperation and trust between company and employee.

VI. Contractor Agreements

Hardly any start-up can manage without contractors. They bring experience and knowledge from other projects and give the start-up the necessary flexibility to separate quickly. But founders should be clear about one thing right from the start: Contractors are not meant to be cheap substitutes for employees.

As described above, the first crucial point is to clarify whether you are really hiring a contractor or an employee. The criteria mentioned above are decisive for this.

1. PUT IT IN WRITING

If your review shows that a contractor is the right choice, it's important to put it in writing. This may be obvious, but is already lacking in a surprisingly large number of companies. Some contractors have been working for months (or even years) without any written documentation at all. This is especially a problem for startups if the contractor's status is being reviewed during due diligence in a financing round or a company audit.

2. AVOID REFERENCES TO EMPLOYEE STATUS

About the content, there are a few points to note: Above all, the contract must not indicate any right of the company to issue instructions. Timelines for the services are generally permissible to a certain extent, but they should not be too detailed. Typical clauses from employment contracts may not be included in contractor agreements. Paid vacation and sick leave clearly would indicate employee status.

Pay attention to non-compete clauses and clauses prohibiting the use of staff to provide services. After all, contract work is characterized by providing services to several customers as well as providing the services through personnel subject to certain conditions. While it is generally possible to agree on a non-compete during the contract's term and even beyond, this should be drafted very carefully, even though the strict requirements for non-competes with employees don't apply.

3. TREATING CONTRACTORS

Young companies often want to live a uniform, integrative corporate culture. They therefore deliberately treat all their team members, whether contractors or employees, equally. But doing so causes confusion when contractors are not easily recognizable as externals. In certain respects contractors must be treated differently. You should also avoid contractors participating in free catering and events for your employees, as all of these are indications of integration and false self-employment.

Pay attention to this from the beginning – granting benefits to contractors and then taking it away from them after a legal check can be toxic for your start-up's culture.

Ultimately, the decisive factor for classification as a contractor or employee is not the provisions in the contract, but how it is lived in practice, so that it is above all necessary to implement the provisions accordingly.

VII. Agency Work

Agency work (also called temporary or contract labor or employee leasing), once prevalent in the blue collar sector, we now see a lot in tech companies as well.

Agency work is when an employee (agency worker) is assigned by his employer /agency or lender) to another company (hirer or user). In contrast to an activity on the basis of a service contract, the agency worker can be fully integrated into the processes of the hirer as if he were their "own" employee.

The hirer's major advantage of agency work is that no employment relationship exists with the agency worker, *i.e.* the hirer does not have to worry about protection against dismissal, social security etc. The agency, being the employer of the agenyc worker, has to deal with that. Another advantage is that agency workers, unlike freelancers or service providers from other companies, can be fully integrated into the work processes like other employees. That can be a great advantage, especially in terms of team spirit.

However, agency work also has disadvantages. Legislators are fundamentally skeptical of this labor model, this goes back to its blue-collar history. For this reason, there is a lot of red tape to consider, especially the Agency Work Act (*Arbeitnehmerüberlassungsgesetz – AÜG*). If you do not comply, there is a risk that the agency worker will become an employee of your start-up after all. But most of the red tape has to be considered by the hirer, there are a number of specialist providers for the tech sector.

We have summarized what you should pay particular attention to if you want to use agency workers in your start-up:

Make sure the lender has an **agency work permit in Germany**. Some providers from abroad also offer so-called employer of records services (EoR) in Germany and take the view that they do not need a German agency work permit for this. But beware: this has not yet been legally regulated or decided by the courts. We therefore advise you to only choose a provider that complies with German law.

Observe **the maximum assignment period**. The same agency worker may only be employed in the same company for a maximum of 18 months. You should therefore take this into account right from the start.
But even if you need long-term support, temporary staffing is not out of the question from the outset, because if the chemistry is right, agency workers are often taken on by the hirer as their own employees after 18 months.

Equal pay and equal treatment must be observed. As a rule, agency workers must be treated and paid in the same way as your own comparable employees. A deviating treatment of agency workere is only permissible if a collective bargaining agreement regulation allows so. Agency work is therefore not a tool for reducing labor costs.

VIII. Recruiting and Onboarding

Recruiting will rarely work without job ads. Here, the requirements of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) must be observed above all. In the worst case, breaches will entitle the rejected candidate to significant compensation for discrimination.

These compensation payments can become a real financial challenge, especially for young companies, even if we don't see any discrimination claims in Germany for multi-million-euro amounts in damages, as is possible in the U.S. by way of punitive damages.

1. DRAFT YOUR JOB ADS PROPERLY

The AGG generally prohibits discrimination for the following reasons:

- Race or ethnic origin
- Sex
- Religion or belief
- Disability
- Age
- Sexual identity

Only in very rare cases provided for by law is discrimination permissible on these grounds – for example where it is a matter of compensating for existing disadvantages (referred to as positive measure or affirmative action) or where the reason represents an essential and decisive occupational requirement due to the activity's nature. As a rule, however, these exceptions are interpreted very narrowly by the courts and are not relevant for start-ups.

You need to observe the requirements of the AGG already in your job ads. Regardless of how they are published, they should always be worded carefully. Even seemingly insignificant details can be seen as an indication of discrimination.

First of all, it is important to draft the job ad in a gender-neutral way. Use gender-independent function designations ("Project Management") or, when using titles, both the male and female job designations, especially when using German language (*Entwickler/in* – Male/Female Developer). In addition, list all the sexes ("male/ female/diverse" or "m/f/d").

Avoid wording that might suggest the applicants' desired age. This doesn't only apply to the obvious (and these days rare) cases where the age limit is explicitly stated ("Software Developers up to 40 years"). The courts already assume age discrimination, for example, if the job ad offers applicants a long-term prospect with a "young and dynamic team." Be careful with phrases such as "job starters wanted" and with references to recently obtained university degrees.

Suggestions of discrimination based on racial or ethnic origin may arise from the required language skills, for example "German as a mother tongue" or "accent-free German." It's safer to draft the requirements in such a way that they can be satisfied by every applicant, regardless of their age or origin, for example "very good knowledge of the German language." But even similar wording has already been interpreted by courts as an indication of discrimination.

It's the company's decision how and where to place its job ads, *e.g.*, on portals like indeed or StepStone, or on job boards for start-ups, or via social media. However, it is problematic if certain groups are clearly favored and others are excluded from the outset. For example, if you place an ad in such a way that it is only displayed to certain user groups on social networks (*e.g.*, men between 25 and 35), you are treading on thin ice from a legal point of view.

Even if you use a headhunter for sourcing, the provisions of the AGG apply. This means: If the headhunter places candidates in breach of non-discrimination regulations, inadmissibly rejected applicants may sue for damages. In order to protect yourself in this case, we suggest trying to agree on an indemnity in the contract with the headhunter.

2. SHORTLISTING CANDIDATES

After receiving applications, you must make a non-discriminatory preselection. The failure to invite an applicant to an interview can also constitute discrimination within the meaning of the AGG. You should therefore only make the preselection on the basis of permissible criteria, such as the applicant's qualifications. Characteristics such as age or origin must in no way play a role.

3. CONDUCTING INTERVIEWS

Over the years, case law has developed a comprehensive list of inadmissible questions for job interviews. Asking an inadmissible question during an interview is interpreted as an indication of discrimination. Then, to avoid damage claims, the employer must prove that no discrimination occurred. Also, the applicant has the right to lie if asked inadmissible questions. A later challenge of the employment contract with reference to the untruthful answer is then not possible. You should know these questions.

However, questions on training, qualifications and professional career are allowed, of course. Questions about the applicant's knowledge of a language, residence and work permit may also be asked, as these last points in particular are a basic requirement for legal employment.

YOU SHOULD AVOID QUESTIONS ON THE FOLLOWING TOPICS UNLESS YOU HAVE A JUSTIFIED INTEREST IN EXCEPTIONAL CASES:

- Age and date of birth
- Marital status
- Birth name
- Origin and nationality
- Religion and belief
- Party and trade union membership
- Pregnancy
- Family planning
- Sexual identity
- Disability

4. DOCUMENTATION OF THE APPLICATION AND SELECTION PROCESS

The entire application and selection process should be documented. Only then will you be able to defend yourself successfully in the event of a dispute. Keep a written record of the reason for rejection for each applicant. Of course, these records must not contain any evidence of discrimination either.

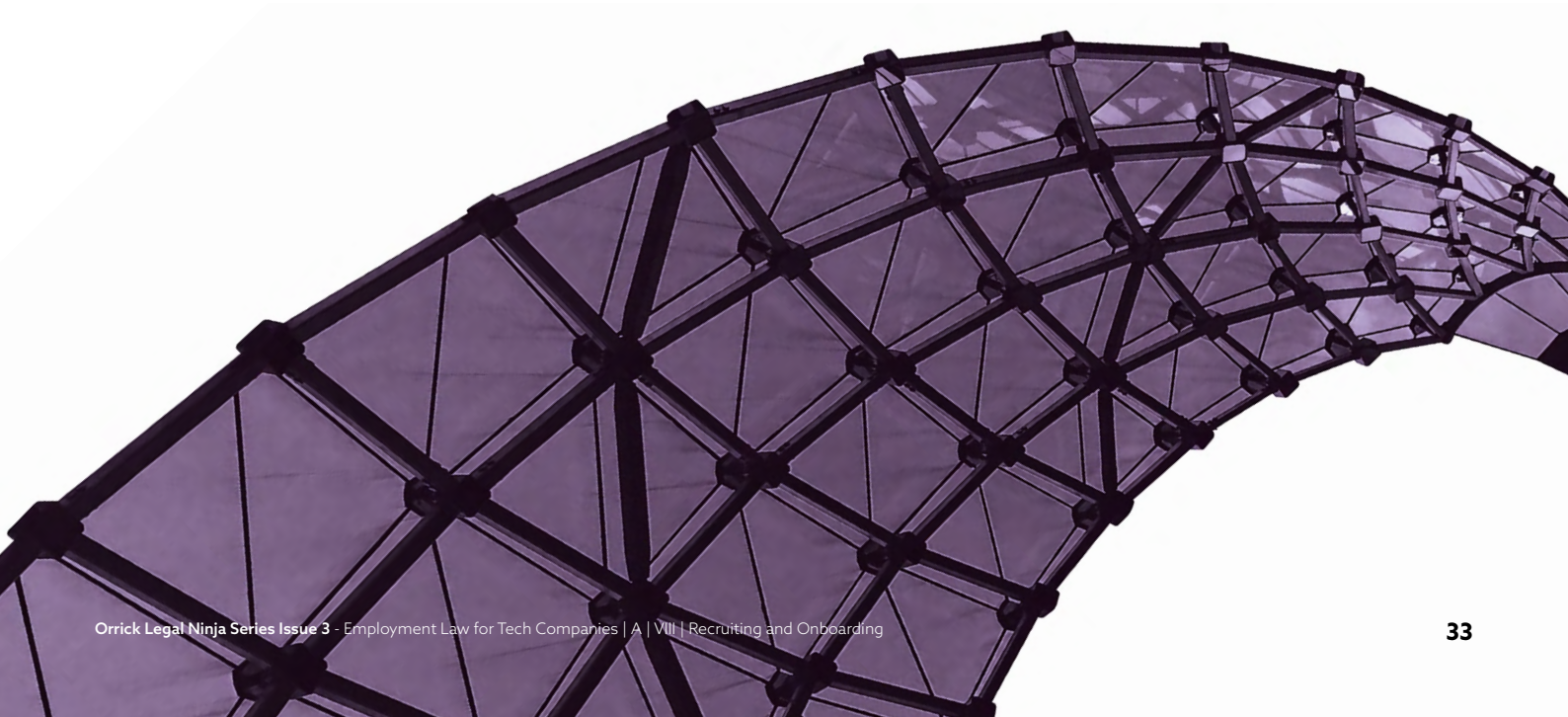
To prevent lawsuits on the grounds of the AGG, consider not informing the applicant of the reason for the rejection. There is no obligation to do so.

5. PROTECTION AGAINST CLAIMS OF THE EMPLOYEE'S FORMER EMPLOYER

When a new employee is hired, compliance with post-contractual obligations towards the old employer must be ensured. This mainly concerns post-contractual non-competition and non-solicitation clauses, and confidentiality obligations. This should be clarified and documented with the employee at the beginning of the employment relationship.

Only the employee himself is directly bound by these post-contractual obligations; only he must pay any agreed contractual penalty to his former employer. Nevertheless, effects on the start-up cannot be ruled out; in any case, it causes trouble and certainly makes the new hire's first days more difficult. The former employer can, under certain circumstances, also take direct action against the new employer and demand injunctive relief and possibly damages.

Also, make sure that employees do not take protected information from their previous employer out the door with them (*e.g.*, USB sticks, cloud-based data, e-mails). If a know-how owner joins from a competitor, the employment contract should contain special wording on that.



IX. Termination of Employment and Off-Boarding

Young companies often hesitate to hire employees because they worry they won't be able to part with them when issues arise (or only in return for a high severance payment). Even though German law does not recognize "at will" employment under U.S. standards, this concern is often unjustified since dismissal protection for employees will be triggered only when certain conditions are met.

1. WHEN DO EMPLOYEES ENJOY DISMISSAL PROTECTION?

The Dismissal Protection Act (*Kündigungsschutzgesetz – KSchG*) grants employees general protection against dismissal after six months of employment if the company employs more than ten employees in Germany. Only then is a legally recognized reason for dismissal needed.

Note well: Contractors and managing directors do not count for the threshold of ten employees and part-time employees only count *pro rata*[5]. Neither do apprentices or interns count for the threshold, and agency workers only under certain circumstances.

In any case, a start-up will not yet exceed the threshold at the very beginning, so the general dismissal protection won't apply: The company can terminate employment without special reason. The termination may not, of course, be immoral or arbitrary or violate non-discrimination rules under the AGG. But within these limits, the company is free to terminate the contract unless, exceptionally, special dismissal protection applies (see below). The agreed notice period needs to be observed, and a proper notice of termination drawn up, and that's basically it.

If the start-up is just below the ten-employee threshold, consider options such as using contractors, interns and external service providers to avoid exceeding it. Make no mistake: as soon as you have more than ten employees, the rules of the game have changed, for all employees.

5. ≤ 20 hours/week: 0.5; ≤ 30 hours/week: 0.75.

2. WHAT REASONS FOR DISMISSAL ARE RECOGNIZED?

As soon as the company exceeds the 10-employee threshold and the employee has been employed for more than six months, the Dismissal Protection Act applies. The law requires a reason for dismissal by the company. Gone are the days where the start-up can lay off employees because they are not "a good fit".

Dismissal is effective only if it is socially justified by

- person-related reasons (*e.g.*, long-term illness or frequent short-term illnesses),
- conduct-related reasons (*e.g.*, breach of non-compete, chronic lateness, refusal to work, offences against the company), or
- urgent business reasons (*e.g.*, discontinuation of a product line, outsourcing).

The requirements for each reason are fairly high and labor courts in Germany tend to be employee-friendly.

A conduct-related dismissal, for example, will require at least one prior warning for a comparable earlier breach of duty. This is often missing in practice. Especially in young companies with small teams, we're seeing that they tend to refrain from giving warnings because that's not in line with their company culture.

Special Note:

Termination for Poor Performance

In general, you may terminate employees for poor performance. This is, however, usually a time-consuming procedure if the general dismissal protection applies, *i.e.* the employee has been employed for more than six months and you have more than ten employees.

The employee needs to fail in fulfilling his responsibility to provide an average service as shown by his individual performance. His performance must be well below the average of a comparable group of employees, and this poor performance must persist over a longer period.

There is no fixed rule as to which period must be considered or to what degree the poor performance must be below average. That depends on the individual case (e.g., job description, measurability of performance, comparability with other employees).

Also, at least one warning is required. Finally, the parties' interests must be carefully weighed against each other. Only if the company's interest in terminating employment prevails will the dismissal be effective. Owing to the many factors involved and their evaluation (by a labor court), the outcome of this process will depend on the individual case.

Special Note:

What Is a Performance Improvement Plan?

Follow the procedure below if you are planning to dismiss an employee for poor performance:

First, the employee's poor performance should be discussed with him and recorded in detail in a Performance Improvement Plan (PIP), taking into account the following points and possible improvements:

- Description of poor performance
- Causes of poor performance
- Potential for improvement
- Actions to be taken by the employee
- Supporting actions of the company
- Time frame for the improvements discussed

If the employee doesn't improve his performance, at least one warning must be issued to him.

This warning must contain:

- When and how the employee violated his contractual obligations with his poor performance
- How and what the employee should have achieved instead
- The warning that he will be dismissed if he commits another similar breach of duty

Only if underperformance continues after the PIP process and a warning has been given, may the company consider dismissal.

It's very likely that the employee will bring an action against the dismissal. To prove compliance with the process in court, you must keep reliable documentation on at least the following points:

- Procedure and results of the discussion on the PIP
- The assessment feedback
- Procedure and outcome of the PIP
- The subsequent development/evaluation
- Warning(s) and further communication

Dismissals for business reasons are usually difficult to justify. First, it's required that the employee's position is eliminated based on a business decision. The business decision itself is usually not reviewed by the labor court. The courts will examine only whether the employer's decision is obviously arbitrary, not whether it was appropriate from a business perspective. The business decision must be made before the termination and should be documented.

Second, there must be no vacancies in the company where the employee to be dismissed can continue his employment. It doesn't matter whether a vacancy is at the same or a lower hierarchical level. But the company doesn't have to promote the employee to a higher vacant position.

Finally, a dismissal for business reasons requires a social selection. The start-up is not free to decide which employee it wants to dismiss, even for business reasons. Employees who have worked for the company for a longer period of time, are older, have more maintenance obligations, and are severely disabled are best protected. A selection based on these legal criteria rarely lets you keep on board the dream team you want. Also, the social selection process is error-prone.

All in all, it's fair to say the requirements for dismissals are high and not even experts can reliably predict whether a termination will hold up in court. Only in cases of clear and well-documented significant breaches with prior warning or that are so serious that a warning is not required (*e.g.*, criminal offences against the company) will this be different. As watertight cases are rare, companies often offer severance payments and separation agreements (more on this below).

3. USE THE PROBATIONARY PERIOD WISELY

During the probationary period (the law calls it the waiting period), employees can be dismissed without cause, even if the company has more than ten employees. Notice period during this time is at least two weeks.

Dismissal can even be made on the very last day of the probationary period; on that day at the latest it must reach the employee. This means:
Notice of termination doesn't have to be given two weeks before the end of the probationary period – this is a common misunderstanding.

Since there is no dismissal protection during the probationary period, you should use it to assess the employee's fit with the team and his performance. Start-ups often aren't aware that it's very easy to dismiss employees during the probationary period but usually much more difficult afterwards – and may then entail a severance payment.

You should therefore record and track the probationary period and use it for assessment. Schedule at least two feedback sessions during the probationary period. If it turns out that the employee does not fit, it's better to give notice within the probationary period (or "extend" the probationary period, see below) than to expect it to work out. Experience shows that in most cases it won't.

4. CAN'T WE JUST EXTEND THE PROBATIONARY PERIOD?

The probationary period is limited to a maximum of six months and cannot just be extended. Sometimes, though, a six-month period is not enough to find out whether someone really is a good fit with the team. In such cases, "extending" the probationary period by some time and avoiding dismissal protection kicking in after six months is possible:

Here's how. Terminate the employee during the probationary period. However, don't use the short two-week notice period, but a longer one, between two and four months. This extended notice period then serves as an extended probationary period: If the employee turns into a good fit with the team by the end of this period, and his performance meets expectations, withdraw the notice and the employment relationship continues. If that doesn't happen, the notice declared during the probationary period remains effective, without dismissal protection taking effect.

It's key to talk to the employee at an early stage, still during the probationary period, about his previous failure to prove himself. When notice of termination is given, the possibility of withdrawing the notice in the event of probation must be clearly shown to the employee. If you use the probationary period extension only to overcome a personnel bottleneck (*e.g.*, while you're looking for a replacement) and without the employee having a real chance during probation, it will likely not survive a court's review.

5. SPECIAL DISMISSAL PROTECTION

Certain employee groups qualify for special dismissal protection.

This includes for example:

- Severely disabled employees: After six months a dismissal is possible only with the prior consent of the integration office, an authority for the interests of severely disabled people.
- Women during pregnancy and up to four months after birth: Dismissal is possible only in exceptional cases with the prior consent of the competent authority.
- Parental leave: Dismissal is possible only in exceptional cases with the prior consent of the competent authority.
- Caregiver leave: Dismissal is possible only in exceptional cases with the prior consent of the competent authority from the time of announcement until the end of the short-term caregiver leave or the long-term caregiver leave in accordance with the Caregiver Leave Act (*Pflegezeitgesetz – PflegeZG*).

This list is not exhaustive. Before thinking about dismissing an employee or initiating exit talks, double-check all information on file to see whether the employee may qualify for special dismissal protection.

6. HOW TO PROPERLY PREPARE DISMISSALS

In terms of content, a notice of termination is not a major challenge: It only needs to be sufficiently clear that the company wishes to terminate the employment relationship and at what point in time. In principle, no reason needs to be stated in the notice of termination. As a rule, you should not mention the reason either, as this can lead to difficulties in a later lawsuit.

Dismissal must be made in writing. The original notice must be signed by an authorized representative and sent to the employee in its original signed version. The safest way is always to have it signed by a legal representative, such as the GmbH's managing director with sole power of representation. It's always a good idea to double-check the power of representation in the commercial register beforehand.

Where the signatory's power of representation doesn't result from the commercial register (*e.g.*, with an HR Manager), always attach an original power of attorney signed by the legal representative. If not, the employee can reject the dismissal because power of attorney has not been submitted. However, this is not possible if he had knowledge of the authorization. This is regularly assumed to be the case with the Head of HR, insofar as his authority to terminate is generally known within the company.

A verbal dismissal or dismissal by e-mail, text or WhatsApp is always invalid. An e-mail with an attached scan of a signed notice is not sufficient, nor is a signature verified by DocuSign, PandaDoc etc.

7. PROPERLY DOCUMENT RECEIPT OF NOTICE

Last but not least, document the employee's receipt of the notice, notably in case of dismissals for good cause (more on this below) and dismissals during the probationary period – in these cases, it is the exact time of receipt that matters and the company must be able to prove in court when it was received.

Receipt of notice can be well documented, for example, by personal handover and an acknowledgement of receipt to be signed by the employee. Delivery by a courier with a delivery protocol is also a good choice.

Registered mail (with or without signature for acknowledgement of receipt) is not a good idea. Where the exact time of receipt is important (*e.g.*, in case of dismissal during the probationary period), you should choose personal handover or delivery by courier.

8. WHAT ABOUT NOTICE PERIODS?

Statutory minimum notice periods must be observed. Even if a shorter notice period is agreed in the employment contract, the statutory minimum notice period will apply. Longer notice periods can generally be freely agreed. This is particularly important for key employees in order to prevent a sudden switch to a competitor.

But note that the employee's notice period must not be longer than the notice period the company must observe.

By law, the employee is bound only by a fairly short notice period of four weeks until the 15th or the end of a calendar month. In other words, the statutory extension of the notice periods with increasing duration of employment only applies to a termination by the company. However, it is permissible (and generally recommended) to agree in the employment contract that this extension also applies to termination by the employee.

THE STATUTORY MINIMUM NOTICE PERIODS FOR A TERMINATION BY THE COMPANY DEPEND ON HOW LONG THE EMPLOYEE HAS BEEN EMPLOYED AT THE TIME OF TERMINATION:

- During an agreed probationary period of up to six months: two weeks at any time
- If no probationary period has been agreed or thereafter: Four weeks until the 15th or the end of a calendar month
- After two years: one month to the end of a calendar month
- After five years: two months to the end of a calendar month
- After eight years: three months to the end of a calendar month

The notice period increases up to a maximum of seven months to the end of a calendar month after 20 years.

9. DISMISSAL FOR CAUSE WITHOUT NOTICE

Extraordinary dismissal for good cause is justified in cases of serious misconduct of the employee. The employee no longer needs to be employed as of the next day and the employment relationship ends upon receipt of the notice of termination, provided it is effective.

Experience shows that many start-ups find it difficult to verify whether the conditions for a dismissal for good cause are satisfied. The requirements are high. If the dismissal is invalid, back pay and social security contributions are due for the non-working period. This can quickly become expensive.

Often the deadline for dismissal for good cause gives you headaches. You may dismiss an employee for good cause only within two weeks after becoming aware of the justifying circumstances. The company will have to prove in court that the deadline has been met. This can be particularly difficult within longer internal investigations, since the investigation steps must be described in detail.

In a nutshell, the examination and the procedure for termination for good cause are complicated and the deadline is short. We recommend consulting an experienced lawyer as soon as possible.

10. SEPARATION BY MUTUAL SEPARATION AGREEMENT

If both parties wish to terminate the employment relationship, a separation agreement is the best option, usually in return for a severance payment. The separation agreement leads to a quick and legally secure termination of employment, whereas court proceedings often are lengthy, tie up resources, can damage a company's reputation, and the outcome is often unpredictable.

Separation agreements need to be in written form. Similar to a notice of termination, scan, e-mail and WhatsApp don't suffice. However, it's sufficient for each party to sign the version intended for the other party.

There are no specific content-related requirements for separation agreements, so the terms of termination can basically be freely negotiated and agreed. The employee is not entitled to a right of revocation after signing. But the principle of fair negotiation applies: If the company puts the employee in a situation of psychological pressure or exploits such a situation to get the employee's signature, the separation agreement will be invalid. In certain circumstances, separation agreements can also be challenged.

11. WHAT SEVERANCE PAYMENTS ARE COMMON?

In addition to the termination date and release from work, the core element of the separation agreement is usually severance pay. In principle, employees have no claim to payment of a severance. If a termination is effective, the employment relationship ends and no severance payment is due. If the termination is invalid, the court will determine this and the employment relationship will continue. In principle, the court cannot award severance payments. However, companies are usually willing to pay severance because it is often unclear whether a termination will hold up in court and then there is the risk of back pay and reinstatement.

Severance payments typically range between 0.5 and 1.5 of monthly gross salaries per year of employment.

It's a matter of negotiation whether only the pure fixed salary or also bonus payments and other payments are considered in the calculation. In practice, such payments are often included at least *pro rata*.

The factor will largely depend on the prospects of success of a lawsuit. If the prospects of success are good (*i.e.* dismissal is likely invalid), we're likely looking at 1.0 or higher. If the odds of success aren't so good, we're probably looking at 0.5 or below. The employee's personal circumstances (*e.g.*, age, qualification, dependents requiring support etc.) also play a major role in quickly agreeing on an amount and a certain factor.

12. PROPERLY SETTLE ALL CLAIMS

There should be a broad settlement and release clause (*i.e.* a provision stating that there are no further claims under the employment relationship) in each separation agreement. However, such a clause must not only cover the claims of the employee, but must be designed on both sides, *i.e.* also cover claims of the start-up against the employee. That's why it's essential to check in advance whether there are still any claims (*e.g.*, from a loan granted or damage claims).

CHECKLIST: WHAT SHOULD A SEPARATION AGREEMENT TYPICALLY COVER?

- ☑ Termination date and, if applicable, employee's right to early termination
- ☑ Release (garden leave)
- ☑ Remuneration (fixed salary, variable remuneration) and other benefits until the termination date
- ☑ Severance payment
- ☑ Remaining vacation (consider for garden leave or pay in lieu)
- ☑ Expenses and travel costs
- ☑ Return of work equipment, documents and data
- ☑ Reference
- ☑ Communication internal/external (depending on position)
- ☑ Non-compete
- ☑ Confidentiality
- ☑ Settlement and (broad) release

X. Know-how Protection and Non-Competes

It's crucial for technology companies to protect their know-how and keep it within the company. This is where non-competes and retention payments come in.

1. PROTECTION OF TRADE SECRETS

Young tech companies operate in a competitive environment where protection of know-how and trade secrets is key. To this end, the Trade Secrets Protection Act (*Gesetz zum Schutz von Geschäftsgeheimnissen – GeschGehG*) offers some effective options. For example, the company can demand that former employees hand over or destroy trade secrets, has claims to information about breaches, and can demand the recall of products that violate trade secrets.

What is or can be a trade secret is understood relatively broadly. The only requirement is that the company must have a legitimate interest in maintaining confidentiality.

ACCORDINGLY, TRADE SECRETS MAY INCLUDE, FOR EXAMPLE, THE FOLLOWING INFORMATION:

- ☑ Customer lists
- ☑ Individual prices that individual customers pay for your products
- ☑ Information about your products, especially code
- ☑ List of your business partners and suppliers
- ☑ Your business strategy and plans for new products

You cannot consider information that you do not have a legitimate interest in keeping confidential to be trade secrets, such as information about crimes or misdemeanors committed by employees or directors.

But the law has one catch: a trade secret is only protected if it is actually secret, *i.e.* not already known to the general public, and is subject to protection measures that are reasonable under the circumstances. Anyone who wants to invoke legal protection of trade secrets must first protect the secret themselves – or at least have tried to do so.

WE HAVE LISTED SOME MEASURES YOU CAN IMPLEMENT TO PROTECT TRADE SECRETS:

- ☑ Confidentiality clauses in employment contracts
- ☑ Internal policies on how employees recognize what a trade secret is and how they are allowed to handle it
- ☑ Restricted access to trade secrets on a "need-to-know" basis
- ☑ Password protection and individual access profiles
- ☑ Regular reminders to employees about trade secret protection
- ☑ Firewalls
- ☑ Visitor management (NDAs!)

If you implement these protection measures and document them accordingly, you will have good chances to enforce the protection of your trade secrets in court.

2. CONTRACTUAL NON-COMPETES

Non-compete clauses can effectively protect the know-how of young tech companies.
Non-competes come in two types:
(1) contractual non-competes are non-compete clauses in force during the term of the contract, and (2) post-contractual non-competes are clauses in force after the termination of the contract.

It goes without saying that an employee should not compete with his employer during the term of the contract. German labor courts share this view, so a non-compete during the term of employment applies even if it hasn't been explicitly agreed in the employment contract.

We nevertheless recommend including the non-compete explicitly in the employment contract, as the only way for both sides to know where the exact boundaries of the non-competition clause run. Otherwise, there is often a lack of clarity, for example, about the holding of shares in competing companies or self-employment during leisure time. Contractual penalties can also be agreed in the event of violations, which often have a deterrent effect of their own.
In practice, it is also often difficult for the company to prove exactly what damage was caused by the violation. This is where the contractual penalty comes in, which in practice offers flat-rate damages.

A good employment contract will therefore always contain a detailed contractual non-compete clause. In the event of a breach of the contractual non-compete, the start-up may terminate employment and claim damages or, if agreed, a contractual penalty.

3. POST-CONTRACTUAL NON-COMPETES

Post-contractual non-competes are more complicated. They must be agreed explicitly and in writing and are subject to high requirements.

They can be included directly in the employment contract or later in a supplementary agreement. In the course of financing rounds or other transactions, for example, it is not at all uncommon for the due diligence to flag that key employees or C-level management are not subject to post-contractual non-competes. In such cases, supplementary agreements are often concluded because the investors understandably have a very strong interest in ensuring that the key players don't move to a competitor from one day to the next.

Since post-contractual non-competes entail substantial financial obligations, it should always be decided on a case-by-case basis whether this protection is desirable and worth the money. Longer notice periods combined with short post-contractual non-competes can be a more favorable, equally effective option to protect your know-how. It may also be agreed that the duration of the post-contractual non-compete will be shortened by a prior garden leave.

If a compensation for non-competition isn't agreed, the employee has a choice at the end of employment: If he wants to comply with the non-compete, he is also entitled to receive compensation for compliance. However, the employee may also decide not to comply with the non-compete. The company does not have this choice.

Post-contractual non-competes may be agreed only for a maximum of two years after termination of employment. However, they have an important prerequisite for their effectiveness: compensation for non-competition. During the non-compete period, the company must pay the employee at least half of the last contractual benefits (fixed salary, variable remuneration and other benefits).

However, the company may waive the post-contractual non-compete, releasing itself from the obligation to pay compensation, but only one year after the declaration of the waiver. The employee, on the other hand, is free to compete immediately after the waiver has been declared if employment has already ended. Regarding the financial burdens on the start-up due to compensation for non-competes, it should be regularly checked whether individual non-competes can be waived, for example because the hired employee does not turn out to be the rock star he seemed to be in the first place. If the company waives the non-compete early in advance, any kind of compensation can be avoided.

In addition, setting out the local and substantive details of the post-contractual non-compete clause is not easy. In case of doubt, labor courts will weigh up the company's and the employee's interests. If the non-compete prohibits the employee from doing more than is in the company's legitimate interest, the non-compete will generally be ineffective.

Since it is difficult to prove the company's actual damage in the event of a violation of the non-compete, it should generally be covered by a contractual penalty.

In principle, companies are more flexible in agreeing on post-contractual non-competes with managing directors than with employees. This is because the strict statutory provisions for post-contractual non-competes do not apply to them. But here, too, caution is required. The courts have also set certain requirements for managing directors regarding duration and compensation for non-competition.

4. RETENTION BONUS

Retention payments are another form of know-how protection. How does this work? In an agreement, the team member is promised that a certain payment will be made if the employment relationship still exists at a certain point in time. The retention bonus can also be regarded as a loyalty bonus: It is paid only if the employment relationship still exists on the agreed date. This incentivizes the employee to continue employment at least until that day.

Note that no further requirements may be included for the payment of the retention bonus that are linked to a specific performance or the achievement of targets. Otherwise, *pro-rata* payments may need to be made even if the employee exits prior to the agreed date.

B.

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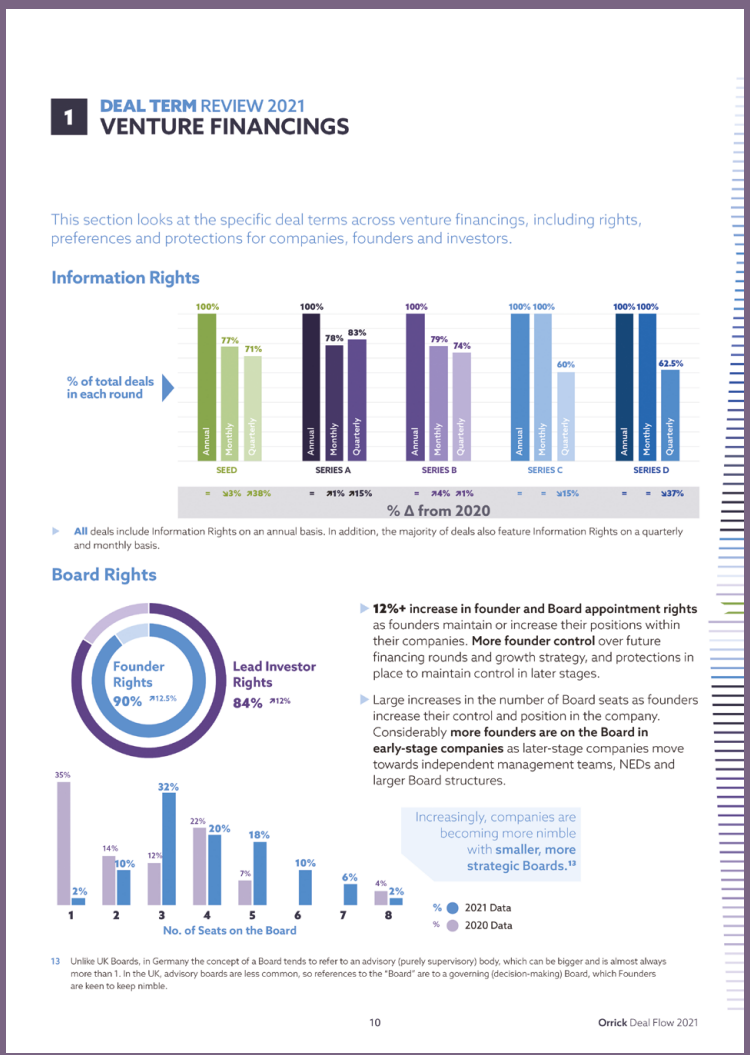
Deal Flow 3.0 with our analysis of the 2022 deal terms will come out in early 2023 and be available at orrick.com.



1 DEAL TERM REVIEW 2021
VENTURE FINANCINGS

This section looks at the specific deal terms across venture financings, including rights, preferences and protections for companies, founders and investors.

Information Rights

% of total deals in each round

SEED: 100% Annual, 77% Monthly, 71% Quarterly
SERIES A: 100% Annual, 78% Monthly, 83% Quarterly
SERIES B: 100% Annual, 79% Monthly, 74% Quarterly
SERIES C: 100% Annual, 100% Monthly, 60% Quarterly
SERIES D: 100% Annual, 100% Monthly, 62.5% Quarterly

% Δ from 2020

All deals include Information Rights on an annual basis. In addition, the majority of deals also feature Information Rights on a quarterly and monthly basis.

Board Rights

Founder Rights 90% ↗12.5%
Lead Investor Rights 84% ↗12%

12%+ increase in founder and Board appointment rights as founders maintain or increase their positions within their companies. **More founder control** over future financing rounds and growth strategy, and protections in place to maintain control in later stages.

Large increases in the number of Board seats as founders increase their control and position in the company. Considerably **more founders are on the Board in early-stage companies** as later-stage companies move towards independent management teams, NEDs and larger Board structures.

Increasingly, companies are becoming more nimble with **smaller, more strategic Boards.**[13]

No. of Seats on the Board: 1 (35%, 2%), 2 (14%, 10%), 3 (12%, 32%), 4 (22%, 20%), 5 (7%, 18%), 6 (10%), 7 (6%), 8 (4%, 2%)

% 2021 Data
% 2020 Data

13 Unlike UK Boards, in Germany the concept of a Board tends to refer to an advisory (purely supervisory) body, which can be bigger and is almost always more than 1. In the UK, advisory boards are less common, so references to the "Board" are to a governing (decision-making) Board, which Founders are keen to keep nimble.

10 Orrick Deal Flow 2021

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C.

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All issues in this series

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May 2019

Venture Debt is a potentially attractive complement to equity financings for business start-ups that already have strong investors on board.

This is a highly flexible instrument with very little dilutive effect for founders and existing investors.

OLNS #2 — Convertible Loans for Tech Companies
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Due to their flexibility and reduced complexity compared to fully-fledged equity financings, convertible loans are an important part of a start-up's financing tool box. In a nutshell: a convertible loan is generally not meant to be repaid, but to be converted into an equity participation in the start-up at a later stage.

OLNS #3 — Employment Law for Tech Companies
January 2023 (this revised edition replaces Dec 2019 issue)

Young technology companies are focused on developing their products and bringing VC investors on board. Every euro in the budget counts, personnel is often limited, and legal advice can be expensive. For these reasons, legal issues are not always top of mind. But trial and error with employment law can quickly become expensive for founders and young companies.

OLNS #4 — Corporate Venture Capital
March 2020

Corporates are under massive pressure to innovate to compete with new disruptive technologies and a successful CVC program offers more than capital – access to company resources and commercial opportunities are key features that justify CVC's prominence. This guide serves to share best practices for corporates and start-ups participating in the CVC ecosystem and also to ask important questions that will shape future direction.

OLNS #5 — Venture Financings in the Wake of the Black Swan
April 2020

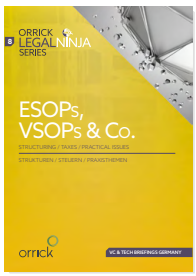
In the current environment, all market participants, and especially entrepreneurs, need to be prepared for a softening in venture financing and make plans to weather the storm. In this guide, we share some of our observations on the most recent developments and give practical guidance for fundraising in (historically) uncertain times. We will first provide a brief overview of the current fundraising environment, and then highlight likely changes in deal terms and structural elements of financings that both entrepreneurs and (existing) investors will have to get their heads around.

OLNS #6 — Leading Tech Companies Through a Downturn
May 2020

Steering a young technology company through a downturn market is a challenging task but if done effectively, the start-up can be well positioned to benefit once the markets come back. While OLNS#5 focused on raising venture financing during a downturn, in this guide, we want to give a comprehensive overview of the legal aspects of some of the most relevant operational matters that founders may now need to deal with, including monitoring obligations and corresponding liabilities of both managing directors and the advisory board, workforce cost reduction measures, IP/IT and data privacy challenges in a remote working environment, effective contract management and loan restructuring.

OLNS #7 — Flip it Right: Two-Tier US Holding Structures for German Start-ups
January 2021

Operating a German technology company in a two-tier structure with a US holding company can have great advantages, most notably with respect to fundraising in early rounds and increased exit options and valuations. However, getting into a two-tier structure (be it through a "flip" or a set-up from scratch) requires careful planning and execution. This guide shows you what to consider and how to navigate legal and tax pitfalls.



OLNS #8 — ESOPs, VSOPs & Co.: Structuring / Taxes / Practical Issues
June 2021

OLNS#8 provides a comprehensive overview of the equity-based and Employee-ownership programs (or in short "ESOPs") play a critical role in attracting and retaining top talent to fledgling young companies. Stock options reward employees for taking the risk of joining a young, unproven business. This risk is offset by the opportunity to participate in the future success of the company. Stock options are one of the main levers that start-ups use to recruit the talent they need; these companies simply can't afford to pay the higher wages of more established businesses. With OLNS#8, we want to help start-ups and investors alike to better understand what employee ownership is, structure them in a way that is congruent with incentives, and implement them cleanly.

OLNS #9 — Venture Capital Deals in Germany: Pitfalls, Key Terms and Success Factors Founders Need to Know
October 2021

Founding and scaling a tech company is a daunting challenge. OLNS#9 summarizes our learnings from working with countless start-ups and scale-ups around the world. We will give hands-on practical advice on how to set up a company, how (not) to compose your cap table, founder team dynamics and equity splits, available financing options, funding process, most important deal terms and much more.

OLNS #10 — University Entrepreneurship & Spin-offs in Germany – Set-up / IP / Financing and Much More
November 2022

German universities are increasingly becoming entrepreneurial hotbeds, but university spin-offs face some unique challenges, some of which could – with the right support systems and policies in place – be considerably less stressful. OLNS#10 helps founders by providing them with an overview of how to get a university-based start-up off the ground. We will discuss founder team composition and equity-splits, the composition of the first cap table, important considerations for the initial legal set-up (founder HoldCos and U.S. holding structures) as well as financing considerations. We will also return again and again to the specifics of IP-based spin-offs, especially when it comes to how a start-up can access the university's IP in an efficient manner.

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